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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____ MISC.

ALBERT MILLER, JR.,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS
OF MARYLAND

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v.

STATE OF MARYLAND,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Petitioner moves this Court to issue a Writ of Certiorari to review the Judgement and Opinion entered on August 30, 1976, by the Court of Special Appeals of Maryland.

DECISIONS BELOW

The Judgement and Opinion of the Court of Special Appeals of Maryland is presently reported in *Miller v. State*, 32 Md. App. 482 (1976) and a copy of that Judgement and Opinion is attached hereto. The Petitioner petitioned the Court of Appeals of Maryland for a Writ of Certiorari and said petition was denied on October 26, 1976. A copy of said denial is attached hereto.

JURISDICTION

Jurisdiction is involved under 28 U.S.C. §1257(3) and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This is an Appeal from a denial of Post Conviction Relief from first the Criminal Court of Baltimore City, then the Court of Special Appeals of Maryland and finally the Court of Appeals of Maryland.

STATEMENT OF FACTS

The Petitioner, Albert Miller, Jr., was indicted in 1969 under Indictment Nos. 6288/69 and 6289/69, charging him respectively with murder and robbery with a dangerous and deadly weapon. On June 2, 1970 the Petitioner pled guilty to the charge of murder in the first degree under Indictment No. 6288/69 and was sentenced to a term of life imprisonment. Pursuant to plea negotiations the State then Nolle Prosequied Indictment No. 6289/69.

Thereafter, the Petitioner took no direct appeal and filed his first Post Conviction Petition October 23, 1975.

QUESTION PRESENTED

Whether a guilty plea is valid under the dictates of *Boykin v. Alabama*, 395 U.S. 238 (1969) if no reference is made to a criminal defendant's privilege against self-incrimination and an adequate waiver obtained thereto.

REASON VOR ALLOWANCE OF THE WRIT

A GUILTY PLEA IN VIOLATION OF THE DICTATES OF *BOYKIN V. ALABAMA*, 395 U.S. 238 CANNOT BE VALID IF THE CRIMINAL DEFENDANT IS NOT ADVISED AND DOES NOT WAIVE HIS PRIVILEGE AGAINST SELF–INCRIMINATION.

It is clear from the transcript of June 2, 1970 that the Petitioner was never advised nor did he waive his privilege against self-incrimination. (A. 10-24)

The Court of Special Appeals of Maryland grounded their affirmance of Petitioner's case on the recent holding in *Davis v. State*, 278 Md. 103 (1976). In *Davis, supra*, the majority found that there was no need for a trial judge to perform a ritualistic litany but only that he be assured a criminal defendant was pleading guilty freely and voluntarily with a full understanding of his rights. Also they found that there need not be an individual reference to a waiver of the privilege against compulsory self-incrimination.

The concurring Opinion of Chief Judge Murphy in *Davis, supra* is helpful in showing the new ground broken by the Court of Appeals of Maryland as a result of *Davis, supra.*

> "Shortly after *Boykin* was decided, the Court of Special Appeals interpreted that decision as making clear 'that if the record does not affirmatively show that a defendant had an intelligent understanding that he possessed each of these specific rights and voluntarily waived them, the acceptance of a plea of guilty would not be effective in any event.' *McCall v. State*, 9 Md. App. 191, 199, 263 A.2d 19 (1970), cert. denied, 258 Md. 729 (1970). (Other cites omitted) The trial courts of the State, adhering to these decisions, have long required a specific, on-the-record reference to, and waiver of, the three constitutional rights outlined in *Boykin.*" *Davis, supra.*

In 1969 this Court decided two cases with reference to the trial judge's acceptance of a guilty plea. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Court held that Rule 11 of the Federal Rules of Criminal Procedure required that a confession of guilt be set aside because the district judge accepted the guilty plea without addressing the defendant personally to determine whether he understood the nature of the charge and without ascertaining that there was a factual basis for the plea. In the course of so holding, Chief Justice Warren, for the Court, noted that:

> "A defendant who enters [a guilty plea] simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an

> intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *McCarthy v. United States, supra.* (footnotes omitted).

Two months later, in *Boykin, supra,* this Court addressed the question of what minimum requirements were imposed by the due process clause of the Fourteenth Amendment with reference to the acceptance of guilty pleas in state courts. Justice Douglas opined as follows:

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right by trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record." *Boykin, supra.*

This Court has just recently examined a state guilty plea and reasoned that it was invalid since a critical element of the crime was not explained. *Henderson v. Morgan*, 423 U.S. 821 (1976).

Implicit in the aforementioned cases is that this Court has mandated an affirmative showing on the record of the explanation and waiver of the three constitutional rights. The decision in the Petitioner's case goes beyond the scope of this Court's decisions and allows a regression to the days of the silent and meaningless trial record with reference to guilty pleas.

It is a dangerous and unnecessary departure from the established practice to allow the Court of Appeals of Maryland to hold, absent a clear mandate from this Court, that *Boykin, supra,* does not mean what it so plainly says; and that the substance of the so-called *Boykin, supra* constitutional rights need not be given preliminarily prior to the acceptance of a guilty plea and an on the record waiver obtained of these rights.

CONCLUSION

For the reasons heretofore cited and in reliance upon the legal authorities hereinabove set forth, it is respectfully submitted that a Writ of Certiorari to the Court of Special Appeals of Maryland be issued herein.

Respectfully submitted,

HOWARD L. CARDIN
JAMES J. GITOMER

Attorneys for Petitioner.

APPENDIX A.

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
NO. 1330
SEPTEMBER TERM, 1975

ALBERT MILLER, JR.
v.
STATE OF MARYLAND

Singley, Smith, Ross (all specially assigned)

OPINION BY SINGLEY, J.
(Filed July 30, 1976)

The appellant, Albert Miller, Jr., pleaded guilty to first degree murder in the Criminal Court of Baltimore (Liss, J.) on 2 June 1970 and was sentenced to life imprisonment. As a result of Miller's plea, the State nol prossed a robbery indictment and agreed to recommend life imprisonment, thus allowing Miller to avoid any possibility of the death penalty. Miller did not appeal.

On 23 October 1975, Miller filed a Petition for Relief under the Uniform Post Conviction Procedure Act, Maryland Code (1957, 1976 Repl. Vol.) Art. 27, § 645A, in which he alleged that:

> " . . . [he] was denied effective assistance of counsel in that a plea of guilty was entered as to first degree murder without the petitioner being advised of his privilege against self-incrimination."

This fact, the petition alleged, rendered the guilty plea void under the mandate of *Boykin v. Alabama*, 395 U.S. 238 (1969), as interpreted by *English v. State*, 16 Md. App. 439, 298 A.2d 464 (1973), *cert. granted*, 268 Md. 748, *dismissed as improvidently granted*, 3 July 1973, and *Davis v. State*, 28 Md. App. 50, 343 A.2d 550, *cert. granted*, Md. (1975), *aff'd*, Md. (#114, September Term, 1975, decided July , 1976).

A hearing was held on the petition in the Criminal Court of Baltimore (Sklar, J.), at which time argument by counsel for Miller was heard, but Miller was not interrogated. The State strenuously maintained that Miller had effectively waived any right to raise the *Boykin* question, see Code (1957, 1976 Repl. Vol.) Art. 27, §645A(c); Maryland Rule BK48(a). The relief sought was denied on both grounds presented: first, that Miller had waived the point, and, that even if there had been no waiver, Miller's guilty plea had been freely and voluntarily given. We granted leave to appeal, Rule BK46, and transferred the case to our regular appeal docket.

Miller has presented two questions for our consideration:

> "1. Did not the Trial Court err in denying Appellant's Petition for Post Conviction Relief when it determined that Appellant's guilty plea was valid under the dictates of *Boykin v. Alabama?*
>
> "2. Did not the Trial Court err in determining that the Appellant effectively waived his right to complain about the infirmity of his guilty plea?"

We are convinced that the question whether *Boykin v. Alabama, supra,* mandates the granting of the relief sought by Miller has been recently answered by the Court of Appeals in

Davis v. State, supra, (#114, September Term, 1975, decided July , 1976). Miller primarily relies upon the earlier opinion in *Davis* written by the Court of Special Appeals, 28 Md. App. 50, 343 A.2d 550 (1975) and upon *English v. State, supra.*

The interpretation given to *Boykin* by this Court in *Davis* and *English*, both *supra*, as well as in *Williams v. State*, 10 Md. App. 570, 271 A.2d 777 (1970), *cert. denied*, 261 Md. 730 (1971); *McCall v. State*, 9 Md. App. 191, 263 A.2d 19, *cert. denied*, 258 Md. 729 (1970) and *Silverberg v. Warden*, 7 Md. App. 657, 256 A.2d 821 (1969) was essentially that:

> "the due process clause of the Fourteenth Amendment requires state trial judges to specifically inform defendants of the essential elements of their privilege against compulsory self-incrimination before accepting their guilty pleas . . ." *Davis v. State, supra,* Md. at (slip op. at 4).

In other words, unless the trial court performed a ritualistic litany in which the accused was told of his Constitutional rights, including those derived from the Fifth Amendment, *Boykin* would be violated. Judge Digges, for the Court of Appeals in *Davis*, after a scholarly review of the Supreme Court cases and the interpretation given *Boykin* in other jurisdictions, determined that our interpretation of *Boykin* was overly restrictive and that the proper interpretation should be:

> ". . . that *Boykin* does not stand for the proposition that the due process clause requires state trial courts to specifically enumerate certain rights, or go through any particular litany, before accepting a defendant's guilty plea; rather, we think

> *Boykin*, merely holds that *the record must affirmatively disclose that the accused entered his confession of guilt voluntarily and understandingly.*" *Davis v. State, supra,* Md. (slip op. at 12). (emphasis supplied).[1]

What the Constitution directs us to do in the instant case, therefore, is to determine whether Miller, under the totality of the circumstances, "entered his confession of guilt voluntarily and and understandingly." This does not, however, require us to review the record of the hearing where Miller's plea was entered in order to determine if the trial court employed any particulary prophylactic procedure before accepting the guilty plea.[2]

The record reveals that Miller took the witness stand during the hearing at which he pleaded guilty and was interrogated in painstaking detail by his counsel. We shall extract from the transcript illustrative portions of that colloquy which we believe conclusively demonstrate that Miller was fully aware of the consequences of his plea of guilty. Preliminarily, we note that Miller had an unusually

---

[1] In *Boykin*, the record of the petitioner's hearing where he pleaded guilty was "wholly silent," 395 U.S. at 240, thus making it "error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." 395 U.S. at 242. The situation is vastly different when the record discloses that the accused either was informed in open court or was already aware of the consequences of his decision to plead guilty.

[2] It is noteworthy that the view taken by the Court of Appeals in *Davis* is shared by the federal courts, including the Fourth Circuit, see, *e.g.*, Wade v. Coiner, 468 F.2d 1059 (4th Cir. 1972); United States v. Frontero, 452 F.2d 406 (5th Cir. 1971).

thorough understanding of the felony-murder doctrine, under which he had been indicted because the murder had occurred in the course of an armed robbery. This is evidenced by the following:

> "Q. [by Miller's counsel] Now give the Court your understanding of what first degree murder is when you kill someone in the course of a robbery.
>
> "A. [by Miller] First degree murder in the course of a robbery is when you go into the place with an intent to rob, and while the robbery is being committed, a murder is committed also at the same time.
>
> * * * * * * *
>
> "Q. Now, is that what happened in this case.
>
> "A. Yes, it is."

There can be, therefore, no doubt that Miller understood the essential elements of the felony-murder doctrine and fully and voluntarily admitted that he entered a store with the intention of committing a robbery and that the victim was murdered in the course of that robbery. This satisfies the recent holding of the Supreme Court in *Henderson v. Morgan*, 44 U.S.L.W. 4910 (June 15, 1976), that a defendant who pleads guilty must be aware of the essential elements of the crime to which he pleads guilty.

The colloquy continued:

> "Q. All right. Now, you understand that when you plead guilty, that you are going to give up your right to a trial by jury, you understand that?

"A. Yes, I do.

* * * * * * * .

"A. My [Miller's] understanding of a jury trial is that a jury trial is twelve people selected from the community of the Baltimore City area . . . and, in accepting the facts, they bring about a verdict . . . whether the defendant is guilty or not guilty, either all the people say that I am, that the person is guilty, or he is not guilty by all the people.

* * * * * * *

"Q. Now, do you understand that you have an absolute right to this jury trial?

"A. Yes, I do.

* * * * * * *

"Q. Now, do you further understand that when you plead guilty, you are going to give up your rights to confront and to cross examine witnesses . . ., your rights to have the state call witnesses . . . to testify on behalf of the state, to bring evidence against you – do you understand that you are giving that up?

"A. Yes, I do understand that.

* * * * * * *

"Q. Now, do you further understand, and did I explain to you that when you plead guilty, you must do this voluntarily; in other words, nobody can make you plead guilty, do you understand that?

"A. Yes, I do.

* * * * * * *

"Q. That you are intelligently giving it [the plea] . . . because, you know, and you are in fact, guilty of murder in the first degree, because you did, in fact, participate in this robbery, and a man was killed as a result of that participation –

"A. Right.

"Q. – is it correct?

"A. Yes, it is.

"Q. And no one has threatened you to give the plea?

"A. No, one at all."

Miller also indicated that he thoroughly understood the nature of his plea bargain, that the State would recommend life imprisonment and would nol pros the robbery indictment, that he understood that he was waiving his right to appeal from his conviction other than on jurisdictional grounds or on the ground that the plea was involuntarily given.

This record was obviously the product of commendable effort and thorough preparation by Miller's counsel, Gerald Kroop, who had interviewed and advised his client at length. The inescapable conclusion, therefore, is that Miller knew precisely the consequences of his plea of guilty and did so voluntarily and freely with full knowledge of the constitutional rights which he thereby waived. While the references to the privilege against compulsory self-incrimination were, in the words of the trial judge, at best "crude," there is simply no longer, under *Davis v. State*, *supra*, Md. (slip op. at 12), any necessity that a

ritualistic litany be performed as long as the accused comprehends the nature of his decision to plead guilty and does so of a free will.[3]

Under the view that we take of this case, it becomes unnecessary for us to consider the question of Miller's waiver of the right to raise the question in a post conviction proceeding.

JUDGMENT AFFIRMED;
RELIEF DENIED.
APPELLANT TO PAY COSTS

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[3] In his brief, Miller states that he was not advised of his privilege against self-incrimination during the course of the hearing where his plea was accepted by the trial court. While we agree that the record fails to indicate any precise reference to the privilege against self-incrimination, it is inconceivable to us that Miller had not been told of the privilege by his counsel prior to the hearing since it is abundantly apparent that Miller had been thoroughly schooled by Mr. Kroop, *see* Stevens v. State, 232 Md. 33, 192 A.2d 73 (1963); State v. McKenzie, 17 Md. App. 563, 303 A.2d 406 (1973). The burden was upon Miller to present evidence that he was unaware of his Fifth Amendment privilege, Maryland Rule BK 48(b). This failure to do so leads us to assume that no such circumstance existed. In any event, we need not concern ourselves with this problem, for we are convinced that the record overwhelmingly reveals the voluntary and knowing nature of Miller's plea.

APPENDIX B

COURT OF APPEALS
OF MARYLAND
NO. 1330
SEPTEMBER TERM, 1975

PER CURIAM

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Judges Singley and Smith did not participate in the consideration of this petition.

/s/ Robert C. Murphy
Chief Judge

Date: October 26, 1976

APPENDIX C

TESTIMONY

Before the Honorable Solomon Liss, Judge
In the Criminal Court of Baltimore
June 2, 1970

STATE OF MARYLAND,
Plaintiff,
v.
ALBERT MILLER,
Defendant

Indictment 628

(T. 2) **PROCEEDINGS**

(The Clerk) Albert Miller, under Indictment 628, the State of Maryland charges you with murder. At the time of your arraignment, a plea of not guilty was entered for you. Your plea today?

(Mr. Kroop) Your Honor, if it please the Court, the plea to Indictment 628 would be guilty to murder in the first degree, and if it please the Court, I would like to put the defendant on the witness stand and question him as to this.

(The Court) All right.

(Mr. Kroop) Albert, go up there, please.

TESTIMONY

ALBERT JAMES MILLER

called as a witness on behalf of himself, having been first duly sworn according to law, was examined and testified as follows:

By the Clerk:

Q. State your name and address, please. A. Albert James Miller, Jr., 1715 West Fayette Street.

DIRECT EXAMINATION

By Mr. Kroop:

(T. 3) Q. All right. Now, Albert, tell the Court, Judge Liss, how old are you? A. I am eighteen years old.

Q. Where were you born, Albert? A. Where was I born?

Q. Yes. A. University Hospital in Baltimore.

Q. In Baltimore City? A. Yes.

Q. Now, how far did you go in school? A. I went to the beginning of the ninth grade.

Q. And at this present time, can you read and write? A. Yes, I can read and write.

Q. Now, you and I have discussed this case, is that correct? A. Yes, we have.

Q. We have discussed this case approximately three or four, maybe five times, while you were in the City Jail, is that correct? A. Yes, it is.

(T. 4) We also discussed the case just about fifteen or twenty minutes right before your going on the witness stand, now, isn't that correct? A. Right.

Q. Now, you understand what you are charged with – you are charged with murdering a man by the name of Ronald Chelwicki, and that happened on August 15th of 1969, do you understand that? A. Yes, I do.

Q. Now, you have pleaded guilty to murdering him in the first degree. Now, you plead guilty because you are, in fact, guilty of murdering him in the first degree? A. Yes, I did.

Q. Now, did I explain to you, Albert, what it is when you murder someone, or when you kill someone in the course of a robbery? A. Yes, you did.

Q. Now, give the Court your understanding of what first degree murder is when you kill someone in the course of a robbery. (T. 5) A. First degree murder in the course of a robbery is when you go into the place with an intent to rob, and while the robbery is being committed, a murder is committed also at the same time.

Q. Right. And you understand that that is called felony murder? A. Yes, I do.

Q. And that if you are convicted of that, of course, you plead guilty to that – that it is, in fact, murder in the first degree? A. Right.

Q. Now, is that what happened in this case? A. Yes, it is.

Q. Did you go in and not only intend to rob Mr. Chelwicki, but, in fact, did you rob him? A. Yes, I did.

Q. And in the course of robbing him, was he shot? A. Yes, he was.

Q. And was he shot by a man, who, other than yourself, was also there to rob him? (T. 6) A. Yes, he was.

Q. As a result of him being shot, of course, you know he died? A. Yes.

Q. You understand that? A. Yes, I do.

Q. Then, you understand it when you plead guilty to murder in the first degree, you are pleading guilty to the fact that you did, in fact, go into rob him, is that correct? A. Yes, it is.

Q. And that you did rob him? A. Yes.

Q. How did you rob him? What did you do? A. Well, I took the money out of his pocket after he was shot dead.

Q. After he was shot? A. Yes.

Q. And the man that shot him, did you go in with that man? A. Yes, I did.

(T. 7) Q. Was it your intention along with that man to rob Mr. Chelwicki– A. Yes, it was.

Q. – is that correct? A. Yes, it is.

Q. All right. Now, you understand that when you plead guilty, that you are going to give up your right to a trial by jury, you understand that? A. Yes, I do.

Q. Now, this is the jury box. Explain to Judge Liss what your understanding of a jury trial is. A. My understanding of a jury trial is that a jury trial is twelve people selected from the community of the Baltimore City area. These twelve people accept the facts that are brought before them by the Court–

Q. Continue. A. – and, in accepting the facts, they bring about a verdict–

Q. That's right. A. – whether the defendant is guilty or not guilty, either all the people say that I am, that the (T. 8) person is guilty, or he is not guilty by all the people.

Q. So then you understand that a jury as you said is selected from community of twelve persons who have to all agree in accepting the facts presented to them that you are either guilty or not guilty? A. Yes.

Q. Now, you understand that you have an absolute right to this jury trial? A. Yes, I do.

Q. Understanding that nobody and no one and no power on earth can tell you not to take a jury? A. Yes, I do.

Q. Do you understand that by pleading guilty, you are giving up this right to this jury trial? A. Yes, I understand.

Q. Now, do you further understand that when you plead guilty, you are going to give up your rights to confront and to cross examine witnesses, and by that I mean, you are giving up your rights to have the State call witnesses to sit in

the witness stand where you are now, and to testify on behalf of the State, to bring (T. 9) evidence against you – do you understanding you are giving that up? A. Yes, I do understand that.

Q. Now, do you further understand, and did I explain to you that when you plead guilty, you must do this voluntarily, in other words, nobody can make you plead guilty, do you understand that? A. Yes, I do.

Q. Now, has anyone promised you anything at all to make you plead guilty? A. I don't understand.

Q. Have any promises been made to you – has anyone promised you anything? A. (nodded head affirmatively.)

Q. Now, tell the Court what promises have been made to you. A. The only promise that have been made to me is that I will get life imprisonment.

Q. Instead of what? A. A possibility of life and twenty, or death penalty plus twenty years.

(T. 10) Q. That's right. Now, you understand that the twenty years can come from what charge? A. The twenty years can come from the indictment of the robbery with a deadly weapon.

Q. That's right. And you understand that the State will drop – that is to say, they will nol pros or drop the case of robbery with a dangerous and deadly weapon against you? A. Yes, I do.

Q. Now, do you also understand that by pleading guilty, that you would receive – there can be no leniency in the sake that you would receive a sentence of life imprisonment – do you understand that? A. Yes, I do.

Q. You understand that if you plead guilty, and this guilty plea is freely given by yourself and voluntarily given, that Judge Liss has nothing else to do but to sentence you, do you understand that? A. Yes, I do understand that.

Q. Do you know that his sentence, that he has no choice but to give you life imprisonment, do you (T. 11) understand that? A. Yes, I do.

Q. Do you understand that you will, if the plea is accepted, receive life imprisonment? A. Right.

Q. Do you understand that? A. Yes, I do.

Q. Now, did I explain to you that in a criminal case, you have a right to an appeal, do you understand that? A. Yes.

Q. Did I further explain to you that if this plea is freely and voluntarily given, and is given knowingly – that is to say, you were doing it intelligently, you know what you are doing – that you waive your rights to an appeal except for two grounds, and those two grounds are as follows: That this Court, in order for you to get a reversal of this conviction, you would have to show that this Court did not have jurisdiction – that is to say, the power or the authority to try you. Did I explain that to you? (T. 12) A. Yes, you did.

Q. Do you understand that I explained that since this crime was committed in Baltimore City, is that correct – A. Right.

Q. – and that since this is the Criminal Court of Baltimore City, that this Court, in fact, does have the jurisdiction, the power, the authority to try you– A. Right.

Q. – you understand that? A. Yes, I do understand that.

Q. So, therefore, even though you could appeal on that ground, since we already know that the Court does have jurisdiction, this would make the appeal useless on that ground –" A. Right.

Q. – you understand that? A. Right.

Q. Do you understand further that the other thing that you could appeal for to the Court of Appeals is (T. 13) that your plea that you are giving right now was not freely given, was not intelligently given and was not voluntarily given, and do you understand that you have just told this Court that you are freely giving it, is that correct? A. Yes, it is.

Q. That you are intelligently giving it – that is to say, the reason you are giving it, because you know, and you are, in fact, guilty of murder in the first degree, because you did, in fact, participate in this robbery, and a man was killed as a result of that participation– A. Right.

Q. –is that correct? A. Yes, it is.

Q. And no one has threatened you to give the plea? A. No one at all.

Q. Now, are there any questions that you have of me or Judge Liss – A. No, there isn't.

(T. 13) Q. – concerning your plea at this time? A. No, it is not.

Q. Now, I want you also to realize that in the courtroom today are the witnesses called by the State that would testify against you in your case. Now, one other thing I want to ask you: You gave a confession in this case, is that correct? A. Right.

Q. And I explained to you that the confession may not be valid – that is to say, it may not be able to be used against you, you understand that? A. Yes, I do.

Q. And still knowing this, that the confession may not be able to be used against you, you are still willing to plead guilty? A. Yes, I am.

Q. Is that correct? And I also explained to you that – strike that – in other words, the fact that you gave a confession in no way is causing or forcing you to plead guilty – A. No, it is not.

(T. 15) Q. – is that correct? Because like I explained, that confession may not be able to be used– A. Right.

Q. – you understand that? A. Yes, I do.

Q. Very well. Do you have questions, now, Albert, about this plea? A. No, I don't have any questions whatsoever.

Q. All right.

(Mr. Kroop) Now, Your Honor, does the Court have any questions relative to this plea?

(The Court) No. Mr. Miller, you have indicated to me that you fully understand the proceedings, that you understand the rights which you have in this case, that you have waived these rights, and that you voluntarily wish to plead guilty in return for the assurance by the State that it will ask for life imprisonment in this case, and will dispose of the robbery charge against you without any additional punishment, is that correct?

(The Witness) Yes, it is.

(T. 16) (The Court) And you want the Court to accept this guilty plea under those circumstances?

(The Witness) Yes, sir.

(The Court) All right.

(Mr. Kroop) Your Honor, for the record, I would also like to indicate that Mr. Miller and I have discussed this case at great length, not only today but on several occasions before today, and I feel as an officer of this Court and as an attorney that this plea is intelligently and is voluntarily given. I feel that he fully understands that, what the felony murder rule is, and he fully understands what his participation was in this case, and what the State has as witnesses against him.

(The Court) I see. All right. We will accept the plea. Very well. Step down.

Take a seat.

(Witness excused.)

(Mr. Horwitz) If the Court please, if Rose Chelwicki were to testify today, she would testify that on the 15th of August, 1969, she, along with her (T. 17) husband, Gronem, went to their place of business, their grocery store at 23rd and Gilford Avenue about 8:00 in the morning. At that time, in her presence, her husband placed about $1,000.00 in the cash register and was preparing the store for business.

Shortly thereafter, one Marvin Johnson entered the premises, purchased a soda. Shortly thereafter, the defendant, Miller, Albert Miller, and a third person by the name of

Emmess Newkirk entered the premises. Mr. Newkirk went by the grocery stand, took out some carrots and at the same time displayed a .22 caliber revolver at which time he said, this is a holdup, and shot Mr. Chelwicki.

Mr. Miller, at that point, reached over, took the wallet from Mr. Chelwicki's body. Then, the defendants, Miller and Johnson, asked Mrs. Chelwicki to open the cash register in order for them to remove the money.

At that point, Miller and Johnson fled the premises.

If the State were to call Catherine Flemming (T. 18) and Renee Brown, they would testify that they saw the defendant, Miller, running from the premises, 23rd and Gilford, shortly after 8:00 carrying money.

The State would further at this point, introduce in evidence as State's Exhibit 1, a .22 caliber revolver, and the bullet removed from the victim's body, .22 caliber bullet.

Also, the report to the crime lab which states that the bullet was, in fact, fired from a .22 caliber gun, the bullet recovered from the body, and this is the report which we would offer as State's Exhibit 2.

(The Court) From whom was the revolver recovered?

(Mr. Horwitz) The revolver was recovered from the defendant, Johnson's home.

(The Court) All right.

(Mr. Horwitz) The defendant was advised of his rights by Sergeant DePaula, of the Homicide Squad on August 16, 1969, at 9:08 a.m.

At that time, he signed a police form 67/69, Explanation of Rights, witnessed by Detective (T. 19) Phillip Smith, whereby he waived his rights under the Miranda vs. Arizona decision.

The State would introduce this State's Exhibit 3, the Waiver of Rights, and the State should introduce as Exhibit 4, a statement by Albert James Miller, Jr., consisting of five pages in which he, in detail, sets forth his participation in this offense.

The State would also introduce as Exhibit 5, the report to the medical examiner's office as to Gronem Chelwicki.

(The Court) That is the autopsy report?

(Mr. Horwitz) That is the autopsy report, Your Honor.

(The Court) All right.

(Mr. Horwitz) Mrs. Chelwicki will identify the defendant as the one who removed the wallet from her husband and who participated in the robbery. Mrs. Chelwicki is in Court, and two girls, Renee Brown and Catherine Flemming were here earlier and will be back later. They stepped out for something right now.

The State would also proffer that if James (T. 20) Norris would testify if, James Norris, who is in Court today – James, stand up, please – he would testify that he was with

Miller and the other persons involved in this on several occasions prior to the robbery and on the night before the robbery, and heard these persons plan in detail the robbery of the grocery store at 23rd and Gilford. And also plan how they would get the gun that they needed in this particular venture.

He also spoke to – well, that, in essence, would be the testimony of Mr. Norris, and that, in essence, would be the State's case.

(The Court) All right. Anything else, Mr. Kroop.

(Mr. Kroop) No, Your Honor. I would just say this, that in some substance, the defense would agree with the proffer of evidence that the State would present to this Court. We await your disposition, Your Honor. Stand up.

(The Court) All right. Of course, the disposition is obvious, but, in the meantime, Mr. Miller, you are eighteen years old?

(T. 21) (The Witness) Yes, sir.

(The Court) You went, you said, to the ninth grade?

(The Witness) Sir?

(The Court) Ninth grade? You went to the ninth grade?

(The Witness) I started in the ninth grade.

(The Court) You started in the ninth grade. Are you married or single?

(The Witness) Single.

(The Court) Have you been taking narcotics prior to this incident?

(The Witness) A few times.

(The Court) A few times?

(The Witness) Yes, sir.

(The Court) Were you or any of the others who were involved in this under the influence of narcotics at the time that this occurred?

(The Witness) I was a little high, but I wasn't you know, under the influence of any narcotics.

(T. 22) (The Court) What had you taken?

(The Witness) I was drinking.

(The Court) You were drinking?

(The Witness) Yes, sir.

(The Court) What about the other men, had they taken any narcotics?

(The Witness) No, sir.

(The Court) All right. You are guilty of murder in the first degree. The sentence is life imprisonment.

(Mr. Kroop) May that date from the date of the arrest, Your Honor?

(The Court) From August the 16th, 1969.

Now, the other case, is it going to be disposed of, Mr. Horwitz?

(Mr. Horwitz) Your Honor, the other case against Mr. Johnson will be tried by a jury in Part 6 this afternoon.

(The Court) No, no – I'm talking about the robbery case.

(Mr. Horwitz) Yes, the State would move to (T. 23) stet –

(The Court) Wait a minute – wait just one minute.

(Mr. Horwitz) The State would move to stet indictment–

(Mr. Kroop) The State will nol pros –

(Mr. Horwitz) All right. The State will nol pros Indictment 6289, which is the burglary indictment.

(The Court) You mean the robbery indictment?

(Mr. Horwitz) The robbery indictment, I will submit to this Court a written nol pros as soon as possible.

(The Court) All right.

(Whereupon, the trial in the above case was concluded.)

76-962

Supreme Court, U. S.
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MAR 31 1977
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. [redacted]

ALBERT MILLER, JR.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This brief is a response in opposition to Petition for Writ of Certiorari filed pursuant to the request of this Honorable Court.

OPINION BELOW

In *Miller v. State,* 32 Md. App. 482 (1976) the Court of Special Appeals of Maryland in a reported opinion upheld the denial of post conviction relief to the Petitioner. The Court of Appeals of Maryland on October 26, 1976 declined to issue a writ of certiorari to the Court of Special Appeals.

JURISDICTION

The Petitioner has invoked the jurisdiction of this Honorable Court pursuant to the provisions of Title 28, U.S.C., Section 1257(3).

STATEMENT OF THE CASE

The Petitioner, Albert Miller, Jr., was charged in the Criminal Court of Baltimore under Indictment No. 6288 of 1969 with murder. He pled guilty on June 2, 1972 to murder in the first degree and was sentenced to a term of life imprisonment by the Honorable Solomon Liss presiding in the Criminal Court of Baltimore. No direct appeal was taken from the guilty plea.

The Petitioner thereafter filed a Petition for Post Conviction Relief alleging that his plea was involuntarily entered. Relief under that Petition was denied and from a denial of post conviction relief and upon an order granting leave to appeal the Petitioner pursued an appeal in the Court of Special Appeals of Maryland. That Court in a reported opinion affirmed Judge Albert L. Sklar's denial of post conviction relief.

STATEMENT OF FACTS

The Respondent adopts as its Statement of Facts Appendix C of the Petition for Writ of Certiorari filed by the Petitioner in the premises, pages A. 10 through A. 24 since that is the entire transcript of proceedings before Judge Liss on June 2, 1972.

QUESTION PRESENTED

Whether a guilty plea is valid under the dictates of *Boykin v. Alabama,* 395 U.S. 238 (1969) if no reference is made to a criminal defendant's privilege against self-incrimination?

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

A GUILTY PLEA IS NOT IN VIOLATION OF *BOYKIN v. ALABAMA*, 395 U.S. 238 (1969), IF THE RECORD DOES NOT SPECIFICALLY REFLECT THAT THE DEFENDANT IS NOT ADVISED OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION SO LONG AS A REVIEWING COURT CAN ASCERTAIN FROM THE TOTALITY OF THE CIRCUMSTANCES THAT THE PLEA IS ENTERED FREELY, VOLUNTARILY AND UNDERSTANDINGLY.

The Court of Special Appeals of Maryland in considering this question presented by the Petitioner concluded that there is no question that the record of proceedings in a guilty plea must reflect under the totality of the circumstances that a criminal defendant has entered a confession of guilt voluntarily and understandingly. The Court of Special Appeals concluded that it was not required to review the record of the hearing in order to determine if the trial court employed any particular prophylactic procedure before accepting that plea. From the record of proceedings below the Court of Special Appeals found that the Petitioner had an unusually thorough understanding of the felony murder doctrine under which he had been charged and there was also no question that the Petitioner freely and voluntarily admitted that he had entered a store with the intention of committing a robbery and that the victim had been murdered in the course of the robbery. The Court also found that the Petitioner indicated a thorough understanding of the nature of the plea bargain, that the State would recommend life imprisonment and would *nol pros* a robbery indictment and that any appeal rights he may have from his conviction were waived as a result of this plea other than jurisdictional grounds or on the grounds that the plea itself was not voluntarily given.

The Court found that the record was a product of thorough preparation by trial counsel for the defendant

who had obviously interviewed and advised the Petitioner at great length and that, therefore, the Court could draw no other conclusion except that the Petitioner knew precisely the consequences of his plea of guilty and did so voluntarily and freely with full knowledge of the constitutional rights which he thereby waived. Relying on a recent Court of Appeals of Maryland case, *Davis v. State*, 278 Md. 103 (1976) the Court stated that there was no longer a necessity that any particular ritualistic litany be performed so long as the accused comprehended the nature of his decision to plead guilty and did so of a free will. In so stating the Court also indicated in a footnote that it was no question in its mind but that the Petitioner had been advised of the privilege by his counsel prior to the hearing since it was apparent that the Petitioner had been thoroughly schooled, citing *Stevens v. State*, 232 Md. 33 (1963) and *State v. McKenzie*, 17 Md. App. 563 (1973).

The legal predicate upon which the Court of Special Appeals ruled was the scholary opinion of the Court of Appeals of Maryland filed by Judge Digges in *Davis v. State, supra,* in which Judge Digges traced the recent history of litigation with regard to the acceptance or rejection of guilty pleas generally. It is difficult to expand upon Judge Digges' analysis of the law. The Court's attention, however, is directed towards pages 116 through 118 of *Davis v. State* at 278 Md. in which Judge Digges lists federal and state decisions which are in direct accord with the Court of Special Appeals opinion in *Miller v. State* and also with the Court of Appeals decision in *Davis v. State.* Among the circuits which have agreed in essence with this position is the Second Circuit, *Hill v. Turnullo,* 510 F.2d 844, 845 (1975) (reserving judgment), the Fourth Circuit, *Wate v. Coiner,* 468 F.2d 1059 (1972); Fifth Circuit, *United States v. Frontero,* 452 F.2d 406, 415 (1971); Sixth

Circuit, *Roddy v. Black,* 516 F.2d 1380 (1975), *cert. denied,* 423 U.S. 917; Seventh Circuit, *United States Ex Rel. Montgomery v. Illinois,* 473 F.2d 1382 (1973) (*per curiam*); Eighth Circuit, *Todd v. Lockhart,* 490 F.2d 626 (1974) (*per curiam*); and the Ninth Circuit, *Wilkins v. Erickson,* 505 F.2d 761 (1974). Additionally Florida, Massachusetts, Minnesota, Missouri, Nebraska, Oregon, Texas, Wisconsin, Nevada, Ohio, Michigan, Alaska, South Dakota and Arizona have also indicated that the interpretation placed on *Boykin v. Alabama, supra,* by the Court of Special Appeals of Maryland in the Petitioner's case is a direct view. See *Barrett v. State,* 544 P.2d 830 (1975); *Hall v. State,* 273 S.2d 90 (1973); *State v. Propotnik,* 216 N.W.2d 637 (1974); *State v. Conner,* 500 S.W.2d 300 (1973); *State v. Turner,* 183 N.W.2d 763 (1971); *Raisley v. Sullivan,* 493 P.2d 745 (1972); *Franks v. State,* 513 S.W.2d 584 (1974); *Jones v. State,* 207 N.W.2d 890 (1973); *People v. Kuzhulan,* 213 N.W.2d 95 (1973); *Heffley v. Warden,* 516 P.2d 1403 (1973); *State v. B chanan,* 334 N.E.2d 503 (1974); *Merrill v. State,* 206 N.W.2d 828 (1973); and, *State v. Williker,* 491 P.2d 465 (1971).

CONCLUSION

Respondent respectfully requests, upon the foregoing points and authorities and arguments, that the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland be denied.

Respectfully submitted,

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